IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0583

STATE OF MONTANA,

Plaintiff and Appellee,

v.

THOMAS GREGORY FERRIS,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Dirk M. Sandefur, Presiding

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STATEMENT OF ISSUE

Whether the district court erred in denying Appellant's motion to withdraw his guilty plea?

STATEMENT OF THE CASE

This is an appeal of a September 22, 2008, final judgment and conviction of the Eighth Judicial District Court, Cascade County, and its subsequent August 26, 2009, order denying Thomas Ferris's (Ferris) motion to withdraw his plea of guilty to the offense of felony criminal distribution of dangerous drugs based on this Court's ruling in *State v. Goetz* and *State v. Hamper*, 2008 MT 296, 345 Mont. 421, 191 P.3d 489 (*Goetz*). (D.C. Docs. 29, 37, attached as Exhibits 1 and 2.)

STATEMENT OF FACTS

By a criminal information filed March 21, 2008, Ferris was charged with the offense of criminal distribution of dangerous drugs, a felony, in violation of Mont. Code Ann. § 45-9-101. (D.C. Docs. 1-2.) This charge was based on Ferris's conduct on March 5, 2008, where the State alleged Ferris sold hydrocodone from his apartment to an undercover confidential informant (CI). (D.C. Docs. 1-2.) The CI wore a hidden body wire, however, law enforcement did not obtain a search warrant before conducting the undercover buy. (D.C. Docs. 1-2.) Besides the electronic evidence obtained from the CI's hidden body wire and the personal observations of law enforcement, no other evidence supported Ferris' criminal

charge. (D.C. Docs. 1-2.) There is no indication in the record that the CI ever agreed to testify at trial.

After a substitution of judge, Ferris was arraigned on April 3, 2008. (D.C. Docs. 4, 7, 9, 11.) On August 7, 2008, Ferris pled guilty, pursuant to a non-binding plea agreement, to the offense of criminal distribution of dangerous drugs, a felony. (D.C. Docs. 17-18; Change of Plea Hrng. Tr. at 7-11.) In return, the State recommended a ten year prison sentence, with five years suspended, and did not seek treatment of Ferris as a persistent felony offender. (D.C. 17-18.) Two weeks later, on August 20, 2008, this Court decided *Goetz*.

No one informed Ferris of this Court's decision in *Goetz*, let alone its implications for his case. The district court proceeded to sentencing on September 18, 2008, where Ferris's counsel argued he be sentenced pursuant to the plea agreement. (Tr. at 5-6.) After mentioning that "[t]his case is based upon a hand-to-hand sale of hydrocodone pills monitored by law enforcement through a confidential informant," the district court sentenced Ferris pursuant to the plea agreement to ten years at the Montana State Prison (MSP), with five years suspended. (D.C. Doc. 29; Sent. Hrng. Tr. at 8.) On July 29, 2009, Ferris filed a motion to withdraw his guilty plea based on this Court's ruling in *Goetz*. (D.C. Doc. 34.) On August 26, 2009, the district court denied the motion without a

hearing. (D.C. Doc. 37.) The basis for the court's ruling was that Ferris did not qualify for retroactive application of *Goetz*.

STANDARD OF REVIEW

This Court reviews de novo a district court's denial of a defendant's motion to withdraw his guilty plea. *State v. Warclub*, 2005 MT 149, ¶ 17, 327 Mont. 352, 114 P.3d 254; *State v. Brinson*, 2009 MT 200, ¶ 3, 351 Mont. 136, 210 P.3d 164; *State v. McFarlane*, 2008 MT 18, ¶ 8, 341 Mont. 166, 176 P.3d 1057.

SUMMARY OF ARGUMENT

Pursuant to this Court's decision in *Goetz*, the district court's denial of Ferris's motion to withdraw his guilty plea was in error and must be reversed. Under the good cause standard, he should have been afforded an opportunity to withdraw his plea as the *Goetz* decision was issued before he was sentenced. Alternatively, Ferris received ineffective assistance of counsel when his trial attorney did not inform him of the *Goetz* decision or its implications for his guilty plea. He should be permitted to withdraw his guilty plea on that basis.

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE PERMITTED FERRIS TO WITHDRAW HIS GUILTY PLEA.

Montana Code Annotated § 46-16-105(2) allows a court to withdraw a guilty plea and substitute a not guilty plea where good cause is shown. In considering a motion for the withdrawal of a guilty plea, a district court must consider the

principles underlying the "good cause standard" in § 46-16-105 and the requirement that the plea must be knowing, voluntary, and intelligent. *State v. Usrey*, 2009 MT 227, ¶ 17, 351 Mont. 341, 212 P.3d 279; *Brinson*, ¶ 8; *State v. Phillips*, 2007 MT 117, ¶ 24, 337 Mont. 248, 159 P.3d 1078; *State v. Deserly*, 2008 MT 242, ¶ 11, 344 Mont. 468, 188 P.3d 1057, overruled in part on other grounds, *State v. Favi*, 2005 MT 288, ¶ 11, 329 Mont. 273, 124 P.3d 164; *see also*, *State v. Locke*, 2008 MT 423, ¶ 15, 347 Mont. 387, 198 P.3d 316.

In reviewing good cause, this Court examines "case-specific considerations," including "the adequacy of the district court's interrogation, the benefits obtained from a plea bargain, the withdrawal's timeliness, and other considerations that may affect the credibility of the claims presented." *McFarlane*, ¶ 17. Any doubts must be resolved in the defendant's favor. *State v. Schaff*, 1998 MT 104, ¶ 17, 288 Mont. 421, 958 P.2d 682, overruled on other grounds, *State v. Enoch*, 269 Mont. 8, 18, 887 P.2d 175, 181 (1994).

This Court has held that good cause to allow a plea withdrawal can be found for additional reasons other than involuntariness. *State v. Lone Elk*, 2005 MT 56, ¶¶ 17-19, 326 Mont. 214, 108 P.3d 500, overruled on other grounds by *Brinson*, ¶ 9. Referencing the Ninth Circuit's liberally applied "just and fair" withdrawal standard, this Court has implied that these additional reasons include an inadequate colloquy, newly discovered evidence, intervening circumstances or any other

reason that did not exist when the defendant pled guilty. *Lone Elk*, ¶ 19 (quoting *United States v. Turner*, 898 F.2d 705, 713 (9th Cir. 1990)); *see also*, *United States v. Ensminger*, 567 F.3d 587, 591 (9th Cir. 2009); *United States v. Davis*, 428 F.3d 802, 805 (9th Cir. 2005). A controlling court decision issued after a defendant's plea but prior to sentencing can form the basis for permitting a defendant to withdraw his guilty plea. *United States v. Ortega-Ascanio*, 376 F.3d 879, 885 (9th Cir. 2004); *Ensminger*, 567 F.3d at 592 ("[a] marked shift in governing law that gives traction to a previously foreclosed or unavailable argument may operate as a fair and just reason to withdraw a guilty plea").

In *Ortega-Ascanio*, the Ninth Circuit found a intervening United States Supreme Court decision, which overruled Circuit precedent and gave the defendant plausible ground for dismissal of his indictment, to be a fair and just reason for withdrawal. *Ortega-Ascanio*, 376 F.3d at 887 (reversing the district court's denial of the defendant's motion to withdraw his guilty plea and remanding for resolution of a motion to dismiss the indictment). In so holding, the Court stressed that "delay alone" in the filing of the motion to withdraw should not affect a court's allowance of the withdrawal. *Ortega-Ascanio*, 376 F.3d at 886 (rejecting the government's argument that a nine-month delay between the Supreme Court decision and the defendant's filing of his motion to withdraw meant that the case did not create a fair and just reason for granting the motion).

This Court's decision in *Goetz* was a qualifying intervening circumstance sufficient to establish good cause for Ferris's withdrawal of his guilty plea. This is especially true when any doubts as to the establishment of good cause must be resolved in the defendant's favor. *Schaff*, ¶ 17. In *Goetz*, this Court held that the warrantless electronic monitoring and recording of a face-to-face conversation with the consent of one participant in the conversation violates the other participant's rights to privacy and to be free from unreasonable searches and seizures guaranteed by Article II, Sections 10 and 11 of the Montana Constitution. *Goetz*, ¶ 25. Thus, pursuant to *Goetz*, the entirety of the evidence used against Ferris was obtained illegally. He should have been afforded an opportunity to withdraw his plea on that basis. If allowed to withdraw his plea, his counsel could have filed a motion to suppress which would have been granted. And, in all likelihood, the charged against him would have ultimately been dismissed.

While Ferris did not file his motion to withdraw his guilty plea prior to sentencing, this should not affect a "good cause" determination and the district court should have permitted him to withdraw his guilty plea. Instead of relying on the good cause standard, however, the district court misapplied this Court's retroactivity analysis of *Goetz* in *State v. Foster-DeBerry*, 2008 MT 397, ¶¶ 3-8, 347 Mont. 164, 197 P.3d 1004 (holding retroactive application not permitted unless defendant similarly challenged the legality of the warrantless electronic

monitoring or demonstrated unique circumstances analogous to those in *State v. Carter*, 2005 MT 87, ¶¶ 13-19, 326 Mont. 427, 114 P.3d 1001). The retroactivity analysis should not be applied to deny a motion to withdraw a guilty plea; rather, an analysis of the "good cause standard" in Mont. Code Ann. § 46-16-105 should be conducted. While a *Goetz* retroactivity analysis may ultimately affect a good cause determination in certain cases, it is not relevant here where *Goetz* was issued prior to Ferris' sentencing and the court's final judgment.

At the time of sentencing, Ferris was unaware of the *Goetz* ruling and its implications for his case. As discussed below, it was his counsel's failure to advise him of the case. Once learning of the case on his own accord, he immediately contacted his counsel. Such failure should not prejudice Ferris--he should be permitted to withdraw his plea. Thus, if this Court's declines to find that the district court erred in denying Ferris' motion to withdraw his guilty plea post-sentencing, then he should be permitted to withdraw his plea based upon the ineffectiveness of his trial counsel.

II. FERRIS RECEIVED INEFFECTIVE ASSISTANCE ON COUNSEL.

The right to effective assistance of counsel is protected by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. The right to counsel is fundamental and applies with equal force to all persons, regardless of their ability to compensate an attorney. *State v.*

Enright, 233 Mont. 225, 228, 758 P.2d 779, 781 (1988) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). A defendant's right to effective assistance of counsel exists in order to give true meaning to the right to a fair trial. *City of Billings v. Smith*, 281 Mont. 133, 136, 932 P.2d 1058, 1060 (1997).

A criminal defendant is denied effective assistance of counsel if: (1) his counsel's conduct falls short of the range reasonably demanded in light of the Sixth Amendment to the United States Constitution; and (2) counsel's failure is prejudicial. *State v. Rose*, 1998 MT 342, ¶ 12, 292 Mont. 350, 972 P.2d 321; *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, to prevail on such a claim, a defendant must show his counsel's performance was deficient and the deficient performance prejudiced him. *Hardin v. State*, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d 746 (*Hans v. State*, 283 Mont. 379, 391-93, 942 P.2d 674, 681-82 (1997)).

To show prejudice, a defendant must show that, but for his counsel's unprofessional errors, there was reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome of the trial. *Soraich v. State*, 2002 MT 187, ¶ 15, 311 Mont. 90, 53 P.3d 878. This burden represents a fairly low threshold. *Riggs v. Fairman*, 399 F.3d 1179, 1183 (9th Cir. 2005). "A 'reasonable probability' is less than a preponderance: '[t]he result of a proceeding

can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'" *Pirtle v. Morgan*, 313 F.3d 1160, 1172 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 694).

Ineffective assistance of counsel claims fall into two categories: record-based and non-record based. *State v. Earl*, 2003 MT 158, ¶ 39, 316 Mont. 263, 71 P.3d 1201. A defendant may raise only record-based ineffective assistance claims on direct appeal. *Earl*, ¶ 39. This Court distinguishes record-based from non-record-based actions based on whether the record fully explains why counsel took, or failed to take, a particular course of action in providing a defense. *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. A claimant must raise a claim of ineffective assistance of counsel in a petition for postconviction relief if the allegation cannot be documented from the record. *Earl*, ¶ 39.

However, claims of ineffective assistance of counsel based on counsel's conduct for which "no plausible justification" exists are considered record-based claims. *State v. Kougl*, 2004 MT 243, ¶ 19, 323 Mont. 6, 97 P.3d 1095 (trial counsel ineffective in failing to request an accomplice jury instruction); *Hagen v. State*, 1999 MT 8, ¶¶ 19-20, 293 Mont. 60, 973 P.2d 233 (claim that trial counsel was ineffective in failing to object to the state's introduction of medical reports, as well as other trial claims, should have been raised on direct appeal); *Petition of*

Hans, 1998 MT 7, ¶¶ 28, 42, 288 Mont. 168, 175, 178, 958 P.2d 1175) (a claim of ineffective assistance predicated upon trial counsel's failure to object to matters during trial "can be decided on the basis of the record" and should have been raised on direct appeal).

Ineffective assistance of counsel can establish good cause for withdrawal of a guilty plea. *McFarlane*, ¶ 11 (citing *Hans v. State*, 283 Mont. at 410-11, 942 P.2d at 693); *State v. Henderson*, 2004 MT 173, ¶ 17, 322 Mont. 69, 93 P.3d 1231. Following the *Strickland* test for ineffective assistance of counsel in regard to a guilty plea, Ferris's trial counsel's performance fell outside the range of competence demanded of a criminal attorney because she should have been aware of the *Goetz* case and its implications for Ferris's guilty plea. *Adams v. State*, 941 So. 2d 553, 554 (Fla. Dist. Ct. App. 1st Dist. 2006) (holding district court erred in applying retroactivity analysis and counsel ineffective for failing to be aware of court decision issued six weeks prior before advising client to enter a guilty plea); *c.f. United States v. Gaviria*, 116 F.3d 1498, 1512 (D.C. Cir. 1997) (holding defendant satisfied the "deficient performance" prong of *Strickland*, where counsel's sentencing representation was incorrect based on a case decided by the court a year and a half earlier and "counsel should have been aware of the decision and its implications for his client"); *Lovett v. Foltz*, 687 F. Supp. 1126, 1136 (E.D. Mich. 1988) ("Lovett's counsel should have been aware of this case law").

At the time of sentencing, Ferris was unaware of the *Goetz* ruling and its implications for his case. There is no plausible justification for Ferris's public defender's failure to be aware of this highly-publicized and noteworthy case. But for his trial counsel's deficient performance in failing to advise him of the case, there is a reasonable probability Ferris would have moved to withdraw his guilty plea based on *Goetz* prior to sentencing. If he had moved to withdraw his guilty plea prior to sentencing, it is likely the district court would have permitted the withdrawal and, in all likelihood, the evidence against him would have been suppressed and the charges dismissed. For these reasons, Ferris's trial counsel's performance was deficient, resulting in prejudice to him. He should be permitted to withdraw his guilty plea.

CONCLUSION

Based on the arguments and authorities asserted above, the district court should have granted Ferris's motion to withdraw his guilty plea. Alternatively, Ferris was denied effective assistance of counsel. This Court should therefore reverse the district court's ruling and remand with directions that the case be dismissed.

Respectfully submitted this ___ day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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ROBIN A. MEGUIRE

APPENDIX